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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

Interworks Unlimited, Inc., a California corporation,)	Case No. 2:17-cv-4983 AB TJH KSx)
)	
Plaintiff,)	EVIDENTIARY OBJECTIONS TO
v.)	EXHIBITS 4, 5 AND 6 OF
)	DEFENDANT'S OPPOSITION TO
Digital Gadgets, LLC., a New Jersey limited liability company,)	PLAINTIFF'S MOTION FOR
)	SUMMARY JUDGMENT
Defendant.)	[FRCP 56(c)(2)]
)	
)	Date: January 7, 2019
)	Time: UNDER SUBMISSION
)	Courtroom: 9B
Digital Gadgets, LLC., a New Jersey limited liability company,)	
)	
Counterclaimant,)	
v.)	
)	
Interworks Unlimited, Inc., a California corporation,)	
)	
Counter-defendant)	

Pursuant to FRCP 56(c)(2), Plaintiff Interworks Unlimited, Inc. (“Plaintiff”) hereby objects to the documents attached as Exhibits 4, 5 and 6 to Defendant Digital Gadget (“Defendant”)’s Opposition to Motion for Summary Judgment. The basis for the objections is that the Defendant did not lay proper foundation, those documents constitute hearsay and/or are inadmissible under FRCP 37 because they were not previously disclosed to the Plaintiff.

I.

DEFENDANT FAILED TO LAY PROPER FOUNDATION FOR EXHIBITS 4, 5 AND 6

Under FRCP 901(a) “[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” This can include “Testimony that an item is what it is claimed to be” FRCP 901(b)(1)

Here, Exhibits 4-6 are inadmissible because the Defendant did not lay proper foundation. All that is set forth is a declaration from Defendant’s lawyer that these documents were “produced in discovery in this case” [*see Paragraphs 5-7 of Declaration of Harlan Lazarus in Support of Opposition to Summary Judgment*] Such evidence is insufficient to authentic these three exhibits. There were no statements as to when, where and from whom the Defendant obtained these documents. They were not produced by the Plaintiff (*see Declaration of Joseph M. Liu*) and, if they were produced pursuant to a subpoena, there was no evidence showing any sort of authentication from the producing party or its custodian of records. Thus, the Plaintiff objects to Exhibits 4-6 based on a failure to lay proper foundation.

II.

EXHIBITS 4, 5 AND 6 ARE INADMISSIBLE HEARSAY

Pursuant to FRCP 801(c), “Hearsay” means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.” Under FRCP 802

1 “Hearsay is not admissible unless any of the following provides otherwise: a federal
2 statute; these rules; or other rules prescribed by the Supreme Court.”

3 Exhibits 4, 5 and 6 are hearsay because the Defendant is trying to prove the
4 truthfulness of the statements stated in those documents. Because the Defendant failed to
5 show how these hearsay documents fall under any of the hearsay exceptions, they are
6 inadmissible to support Defendant’s opposition. Therefore, the Plaintiff further objects to
7 Exhibits 4-6 on the ground of hearsay.

8 9 III.

10 **EXHIBITS 4, 5 AND 6 WERE NOT PREVIOUSLY PRODUCED AND ARE** 11 **EXCLUDED UNDER FRCP 37.**

12 Under FRCP 37(c), “[i]f a party fails to provide information or identify a
13 witness as required by Rule 26(a) or (e), the party is **not allowed to use that**
14 **information or witness to supply evidence on a motion**, at a hearing, or at a trial,
15 unless the failure was substantially justified or is harmless.” [emphasis added]
16 Under FRCP 26(a), a party needs to provide “(ii) a copy-or a description by
17 category and location-of **all documents**, electronically stored information, and
18 tangible things that the disclosing party has in its possession, custody, or control
19 and may use **to support its claims or defenses**, unless the use would be solely for
20 impeachment.” FRCP 26(a)(1)(A)(ii) [emphasis added] And this duty is an
21 ongoing duty. Under FRCP 26(e)(1), A party who has made a disclosure under
22 Rule 26(a)-or who has responded to an interrogatory, request for production, or
23 request for admission-must **supplement or correct its disclosure or response:**
24 (A) in a timely manner if the party learns that in some material respect the
25 disclosure or response is incomplete or incorrect, and if the additional or corrective
26 information has not otherwise been made known to the other parties during the
27 discovery process or in writing; or (B) as ordered by the court.” [emphasis added]
28

1 In this case, one of the Defendant's affirmative defenses was that the
2 Plaintiff lacked standing. During discovery, the Plaintiff also asked the Defendant
3 to produce all documents to support its defenses (*see Declaration of Joseph M.*
4 *Liu*). The documents attached as exhibits attached as Exhibits 4, 5 and 6, were
5 never produced during initial disclosures or discovery. Moreover the Defendant
6 never supplemented its disclosures or discovery responses. Even if these three
7 documents were obtained after initial disclosures or by subpoena during discovery,
8 the Defendant has a continuing duty to supplement its responses. Pursuant to the
9 Court's Order, the deadline for non-expert discovery was October 19, 2018. The
10 Defendant cannot now cure its failure by supplementing its disclosures or
11 discovery responses. Therefore, Plaintiff objects to Exhibits 4-6 under FRCP 37,
12 and the Defendant is barred from using those documents to support its opposition.

13
14 Date: December 26, 2018

By: /s/ Joseph M. Liu, Esq.
Joseph M. Liu, Esq.
Attorneys for Plaintiff/Counter
Defendant Interworks
Unlimited, Inc.